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Supreme Court of the United States

OCTOBER TERM, 1961

NOS. [illegible] AND [illegible]

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board,

Petitioner,

against

EMPRESA HONDURENA DE VAPORES, S.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

No. 858—O. T. 1961

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

against

EMPRESA HONDURENA DE VAPORES, S.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

No. 862—O. T. 1961

RESPONDENT'S BRIEF IN CONNECTION WITH PETITIONS FOR CERTIORARI.

ORISON S. MARDEN,
Attorney for Respondent,
14 Wall Street,
New York 5, New York.

CHESTER BORDEAU,
WILLIAM D. CONWELL,
Of Counsel.

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RESPONDENT'S BRIEF IN CONNECTION WITH PETITIONS FOR CERTIORARI AND APPENDIX.

Respondent submits that the decision of the United States Court of Appeals for the Second Circuit is in all respects correct and is fully supported by the decisions of this Court in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957) and in *Marine Cooks* v. *Panama SS. Co.*, 362 U. S. 365 (1960).

Further, the position of the United States as heretofore expressed in this case and in the proceedings before the National Labor Relations Board which gave rise to this case, is in consonance with the opinion of the Court of Appeals.

However, respondent does not object to the granting of the petitions; but if granted, the following two questions are those which should be presented for review in lieu of the questions suggested by petitioners.

Questions Presented.

I.

Whether the Labor Management Relations Act, 1947 (29 U. S. C. §§141, et seq.) extends to the organizational and collective bargaining activities of unlicensed seamen:

(a) who are all Honduran citizens except one, a Jamaican citizen;

(b) who are employed in the Republic of Honduras, under shipping articles executed in Honduras, by a Honduran corporation whose stock is owned by an American corporation;

(c) who man seagoing vessels, owned by the Honduran corporation, which are engaged almost exclusively in regular sailings in foreign commerce between the United States and Honduras and other Latin American ports and which fly the flag of, and are registered in, the Republic of Honduras and are time chartered to the American corporation; and

(d) who are represented by a Honduran labor union which is the exclusive bargaining representative of these seamen under Honduran law.

The question is not, as suggested by petitioner McLeod, whether the Act extends to seagoing vessels. The Act does not purport to extend jurisdiction to "seagoing vessels".

It extends to employees within the contemplation of the Act and the protection of their organizational and collective bargaining activities (29 U. S. C. §§141, *et seq.*).

Nor does the record in this case concerning the terms and conditions of employment, including the payment of wages and discipline of personnel, show (as erroneously stated in the questions presented by the petitioners) that the seagoing vessels are operated under the control of an American corporation. Indeed, the Board in its findings stated (pages 43a, 44a of appendix to petition of National Maritime Union):

> "As the owner and operator of the vessels under time charter, Empresa [respondent] must provide ships that are fully equipped and ready to put to sea. Thus, it is responsible not only for the physical condition of the ships and for provisioning them, except for fuel, but also for hiring the officers and crews, and handling all matters concerning terms and conditions of employment, including payment of wages and discipline of the personnel. There is nothing in the record to suggest that Empresa does not, in fact, carry out these typical responsibilities of the owner of a vessel under a time charter."

II.

Whether the action of the National Labor Relations Board in directing the representation election among respondent's unlicensed seamen violates the provisions of the Constitution of the United States as follows:

> *a. by contravening the provisions of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras dated December 7, 1927, 45 Stat. 2618 (1927) in violation of Article VI of the Constitution.*

b. by infringing upon the functions and powers of the Department of State of the United States in conducting the foreign affairs of the United States in violation of section 2 of Article II of the Constitution.

c. by exceeding the powers granted to Congress under section 8 of Article I of the Constitution.

d. by depriving respondent of its "liberty, or property, without due process of law" in that respondent, a citizen of the Republic of Honduras, would be deprived of its liberty to contract and, furthermore, would be deprived of its rights under an existing collective bargaining agreement with a Honduran union, the exclusive bargaining agent of the aforesaid seamen under Honduran law, in violation of Amendment V to the Constitution.

The questions presented by petitioner, National Maritime Union of America, AFL-CIO, are inappropriate and should not be presented for review.

The Position Heretofore Taken by the United States.

On December 15, 1961, the Department of State of the United States, through its Legal Advisor, forwarded to the Honorable Edmund L. Palmieri, before whom the motion for a temporary injunction had been heard, a Note dated October 29, 1961 from the Ambassador of Honduras protesting the Board's Decision and Direction of Election, as in violation of Articles 10 and 22 of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras, dated December 7, 1927 (45 Stat. 2618), as infringing upon the sovereignty of Honduras and upon established principles of international law. A copy of this Note was before the United States Court of Appeals for the Second Circuit,

together with a copy of a letter dated January 10, 1962, from the United States Department of Justice to the District Court for the District of Columbia stating that although the Department of State:

> "does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case."

The original of this letter dated January 10, 1962 from the Department of Justice was delivered to the District Court for the District of Columbia where Sociedad Nacional de Marineros de Honduras (collective bargaining agent for respondent's unlicensed seamen) had brought an action to restrain the members of the Board from conducting the same representation election involved in this case. Summary judgment granting a permanent injunction was entered by Judge Holtzoff and a petition for certiorari in that case has been filed with this Court by the Board.

In the proceeding before the National Labor Relations Board which gave rise to this action (Case No. 2-RC-10379), the United States, intervenor as *amicus*, filed a brief with the Board at the request of the Department of State and the Department of Defense. The Under Secretary of State by letter to the Attorney General dated October 26, 1960, a copy of which is attached to that brief, requested

> "the Department of Justice to intervene in these proceedings to present to the National Labor Relations Board the views of the Department of State upon certain significant matters of maritime and international law present in these proceedings."

The Secretary of Defense by letter to the Attorney General dated October 27, 1960, a copy of which is also attached to

that brief, requested the Department of Justice to submit to the Board certain defense policy considerations.

In its brief, the Department of Justice on behalf of the United States made the following pertinent points, among others:

1. Congress did not intend the Labor Management Relations Act to govern the internal labor relations of a foreign ship and its foreign crew.

2. The flag of a ship determines its nationality and the nation with jurisdiction over its internal economy.

3. Treaties of the United States with other nations require recognition of the nationality of a vessel by its flag.

4. If a corporation organized under the laws of a foreign nation owns or operates a foreign flag vessel, manned by a foreign crew, its identity as a foreign vessel seems established, although the holders of stock in the corporation may be American in whole or in part.

Present Status of Case.

In the case at bar, the mandate of the United States Court of Appeals for the Second Circuit was made the order of the United States District Court for the Southern District of New York by order dated February 15, 1962, granting the motion of respondent for a preliminary injunction and denying petitioner's motion for dismissal of the complaint. A copy of that order is annexed hereto.

Conclusion.

If either petition is granted, the questions to be reviewed should be those presented herein, in lieu of the questions suggested by petitioners.

Respectfully submitted,

ORISON S. MARDEN,
Attorney for Respondent.

CHESTER BORDEAU,
WILLIAM D. CONWELL,
Of Counsel.

Dated: New York, N. Y.
May 9, 1962.

APPENDIX.

Order Dated February 15, 1962.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EMPRESA HONDURENA DE VAPORES, S. A.,
Plaintiff,
against
IVAN C. MCLEOD, Regional Director for the Second Region of the National Labor Relations Board,
Defendant.

61 Civil 4413.
Order.

A motion having been made by plaintiff for an order providing that the mandate of the United States Court of Appeals for the Second Circuit, consisting of the opinion of the Honorable Henry J. Friendly, Circuit Judge, concurred in by the Honorable J. Edward Lumbard, Chief Judge, and Thurgood Marshall, Circuit Judge, and the order of reversal of the United States Court of Appeals for the Second Circuit dated January 12, 1962, filed with the Clerk of this court on January 30, 1962, be made the order of this court and providing for the injunctive relief requested by plaintiff in the order to show cause dated December 12, 1961, and providing for the denial of the motion made by defendant for a dismissal of the action, and on motion of White & Case, attorneys for plaintiff, it is

1. ORDERED, that the mandate of the United States Court of Appeals for the Second Circuit, filed with the Clerk of the United States District Court for the Southern District of New York on January 30, 1962, is hereby made the order of this court;

2. ORDERED, that pending the trial and adjudication of the issues raised by the complaint herein, the defendant, Ivan C. McLeod, Regional Director for the Second Region of the National Labor Relations Board, and all persons acting for or in concert or in participation with him who receive actual notice of this order by personal service or otherwise; are hereby enjoined from conducting a representation election among plaintiff's unlicensed seamen until the final hearing and determination of this action, and it is further

3. ORDERED, that security in the amount of $500 be furnished by plaintiff conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, and it is further

4. ORDERED, that the motion of defendant to dismiss the complaint be, and the same hereby is, denied.

Dated: New York, New York
February 15th, 1962

EDMUND L. PALMIERI,
United States District Judge.

2/21/62
O. K.
H. A. C.

A True Copy
HERBERT A. CHARLISON, Clerk
By ELSIE M. EILE
Deputy Clerk